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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SUSAN MAE POLK,

Defendant and Appellant.

A133219

(Contra Costa County
Super. Ct. No. 031668-7)

Defendant Susan Mae Polk agreed to reimburse Contra Costa County (County) for defense costs it paid on her behalf in connection with her murder trial. Defendant's performance under the agreement was secured by her half-interest in a residence. Following her conviction, the trial court authorized the County's reimbursement from the proceeds of the sale of the residence. Because the trial court did not conduct a hearing regarding defendant's ability to pay prior to entering this order, in an earlier decision, we reversed the trial court's reimbursement order and directed it to hold a new hearing. Finding no error in the trial court's second hearing, we affirm.

I. BACKGROUND

Defendant was convicted of second degree murder of her husband and sentenced to a prison term of 16 years to life. We affirmed that conviction in a partially published decision, filed December 13, 2010. (*People v. Polk* (2010) 190 Cal.App.4th 1183 (*Polk*).)

Although defendant represented herself in the trial that resulted in her conviction, she was provided legal assistance. The cost of this assistance was paid by the County

under a written agreement with defendant requiring her to reimburse. As we explained in *Polk*:

“Prior to the second trial, defendant executed a promissory note to pay the County ‘the sum as fixed by the Superior Court for Court Appointed Counsel services and for any other cost related to my defense.’ Performance under the note was secured by a deed of trust against defendant’s interest in the Orinda home she owned with [her husband], purchased in 2000. In 2006, their respective interests were partitioned at the request of his estate, and in June 2007, a referee was appointed to sell the home.

“In August 2007, six months after defendant’s sentencing, the County filed a motion for an order requiring her to reimburse the County for the costs of defense it had incurred on her behalf, set at nearly \$220,000. The County argued defendant had both a contractual obligation to reimburse, based on the promissory note she executed, and a statutory obligation under Penal Code section 987.8. Although the home had not been sold at the time the motion was filed, it was listed at \$2 million. The County argued defendant had the ability to reimburse the costs in full because, according to a schedule it submitted, she would receive more than \$230,000 even if the home sold for only two-thirds of the asking price. [¶] . . .

“Although subdivision (b) of Penal Code section 987.8 permits the court to order reimbursement of defense costs only if a defendant is found to have the ‘present ability to pay’ them, the trial court declined to make a determination of defendant’s ability to repay the County’s expenses. The court explained it viewed itself as proceeding under subdivision (a) of section 987.8, which establishes a procedure for securing the reimbursement of fees for court-appointed counsel through an attachment of property. . . .

“After hearing testimony regarding the various charges claimed by the County, the trial court found the reimbursable costs to be \$212,033, and set that amount as the value of the lien on defendant’s interest in the home. The trial court’s determination of the amount of reimbursable costs is not challenged on appeal.” (*Polk, supra*, 190 Cal.App.4th at pp. 1204–1205, fns. omitted.)

We reversed the trial court's order requiring reimbursement, concluding, "[Penal Code section 987.8,] subdivision (a) provides a means for securing reimbursement of defense costs, but it is not an independent basis for awarding reimbursement. As a result, a trial court must comply with the remaining provisions of section 987.8, including making a determination of ability to pay under subdivision (b), before reimbursement may be granted." (*Polk, supra*, 190 Cal.App.4th at p. 1206.) We remanded the matter "solely for the purpose of holding a hearing to determine defendant's present ability to pay all or a portion of the \$212,033 in reimbursable defense costs determined by the trial court and entering an appropriate order under section 987.8, subdivision (e)." (*Id.* at p. 1212.)

With that background, we turn to the record in the present matter.

Defendant's home, which had been listed for sale at the time of the original hearing in August 2007, was sold in November 2007 for considerably less than the listing price. Defendant's one-half share of the net proceeds, after subtracting the costs of sale and estate administration, was \$200,019. In an order dated February 1, 2008, the probate court divided that sum between the County and another lienholder. The County received \$192,338 in reimbursement for defendant's defense costs.

On February 25, 2011, following our decision in *Polk*, the trial court scheduled a new Penal Code section 987.8 hearing for May 20, 2011. When the Department of Corrections failed to produce defendant for the May 20 hearing, the matter was rescheduled for June 10.¹ At the outset of the rescheduled hearing, defendant told the court she was not prepared to proceed, explaining, "I just arrived here yesterday, and I have not had a chance to try to get counsel. I have written some letters, and my

¹ In her reply brief, defendant contends she had little time to prepare for the June hearing because the notice of hearing was not sent until May 27. As noted in the text, the hearing was originally scheduled in February to occur on May 20. In a May 26 letter to the court, defendant acknowledged her awareness of the February 25 order and May 20 hearing without claiming lack of notice. While the June hearing itself was scheduled on short notice, defendant had been prepared for a hearing on this issue as early as May 20.

understanding was that I would handle it when I got here. I want to be represented by counsel, if I can do that.”

After some discussion, the court denied defendant’s request for appointed counsel, noting “the rights accorded you are listed in the code section. They do not include the right to an attorney.” The court further declined to delay the hearing, noting defendant had not filed her request in advance of the hearing and explaining, “I believe we’ve given you enough notice to prepare. I’m fully aware there’s a full law library in prison, and this code section and the other code sections are available to you. You did represent yourself in the past on the criminal matter as well as had counsel at certain points. [¶] . . . I don’t find good cause or a showing of any attempt to hire an attorney or any indication that any attorney is willing to do this pro bono.”

Proceeding to represent herself, defendant framed the issue before the court as her ability to pay the defense costs at the time of her sentencing and for a six-month period thereafter. She argued she “clearly didn’t” have that ability, since “you can’t wipe someone out of all of their assets to pay the county, to reimburse the county for the cost of the defense.” Defendant testified that the half-interest in her home, which she acknowledged owning at the time of her sentencing, was her sole financial asset. She argued she needed the proceeds from the home to provide for her children, who were young adults at the time of the hearing.

Although the County’s attorney said she agreed with defendant about the time period at which the ability to pay should be determined, she somewhat inconsistently focused her argument on the six months following the original Penal Code section 987.8 hearing, which itself occurred six months after sentencing. Counsel argued defendant’s ability to pay was demonstrated not only by her ownership of the half-interest in the residence in August 2007, but also by her later payment of \$192,000 in early 2008.

The trial court found defendant able to pay the County’s expenses. As the court explained, “I am satisfied that, in fact, at the time of sentencing and at the time of the hearing that I held [in August 2007], the defendant had a present financial position that was sufficient to pay for the costs of her representation . . . [¶] In addition, at the—six

months after the time of sentencing, at the time we held that hearing, and for six months after that hearing, she had the future financial position of an asset worth at the time we determined only to be \$192,338.09. [¶] So I do find that at the time of sentencing, she had the present financial position with an asset worth more than the cost of the County.” The court found no hardship to defendant’s dependents from the payment to the County, since none of defendant’s children were still dependents at the time of the original hearing.

II. DISCUSSION

Defendant contends the trial court erred in refusing to appoint counsel to represent her and applied the wrong time period in determining her financial position.

A. Appointment of Counsel

An indigent prisoner has a right of access to the courts to defend a civil suit. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 919 (*Payne*).) The trial court can choose from a number of methods to ensure such access, including “(1) deferral of the action until the prisoner is released [citation]; (2) appointment of counsel for the prisoner [citations]; (3) transfer of the prisoner to court [citations]; (4) utilization of depositions in lieu of personal appearances [citations]; (5) holding of trial in prison [citation]; (6) conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone [citation]; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; and (9) implementation of other innovative, imaginative procedures [citations].” (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792–793, fns. omitted (*Wantuch*).)

In choosing among the various alternative means for preserving a prisoner’s access to the courts, “the trial court should consider the nature of the action, the potential effect on the prisoner’s property, the necessity for the prisoner’s presence, the prisoner’s role in the action, the prisoner’s literacy, intelligence and competence to represent himself or herself, the stage of the proceedings, the access of the prisoner to a law library and legal materials, the length of the sentence, the feasibility of transferring the prisoner to court and the cost and inconvenience to the prison and judicial systems.” (*Wantuch, supra*, 32 Cal.App.4th at p. 793.) A prisoner is not entitled to any particular means of

securing access and cannot force the appointment of counsel unless there is no feasible alternative. (*Payne, supra*, 17 Cal.3d at p. 924 [trial court cannot deny counsel “when no other relief will preserve [the prisoner’s] right of access”]; *Wantuch*, at p. 793.)

The trial court’s determination of the appropriate remedy to secure access is reviewed for abuse of discretion. (*Wantuch, supra*, 32 Cal.App.4th at p. 794.)

We find no abuse of the trial court’s discretion in declining to appoint counsel. At issue was a single judicial hearing, not a continuing lawsuit. Defendant was transferred from prison to the courtroom and was present for the hearing. Because she was present, it was unnecessary for defendant to be represented by counsel to secure her access to the court. Further, the lack of counsel did not prevent her from offering her defense to the County’s claim on her assets. As the trial court noted, she was experienced at representing her own legal interests and was capable of articulating arguments and presenting testimony.

The cases on which defendant relies, *Payne*, *Wantuch*, and *Yarborough v. Superior Court* (1985) 39 Cal.3d 197, all concerned a prisoner’s pursuit or defense of a civil action. Lawsuits present complex logistics that make it difficult to secure a prisoner’s consistent access to court, including participation in discovery, various pretrial courtroom appearances, and trial. In those circumstances, appointment of counsel may be the only practical way of ensuring a defendant’s interests are protected, as *Payne* noted. Defendant’s proceeding did not present the same practical concerns, since it consisted of a single hearing. Under *Wantuch*, one method of ensuring a prisoner’s access to the courts is to transfer the prisoner to court. (*Wantuch, supra*, 32 Cal.App.4th at p. 792.) That is what happened here.

Defendant contends the trial court erred in not expressly considering the full range of factors under *Wantuch* in making the decision whether to appoint counsel. If defendant had been faced with a civil lawsuit, the trial court’s failure to engage in more deliberate decisionmaking might have caused us concern. As discussed above, however, this was a single, legally straightforward hearing for which defendant was present. Her right of access to the court was therefore secured. In that circumstance, the trial court

was correct in reasoning defendant had no right to counsel, and it did not abuse its discretion in concluding counsel was otherwise unnecessary.

Defendant also contends, in a conclusory manner, that an attorney would have been “helpful” in these circumstances, citing language from *Payne*.² (*Payne, supra*, 17 Cal.3d at p. 924.) Appointment of an attorney is not “helpful” for purposes of *Payne* merely because the attorney could have assisted the prisoner in making his or her case. Instead, the attorney must have been able to make some practical difference in the outcome. (*Yarborough, supra*, 39 Cal.3d at pp. 205–207.) Because defendant fails to specify any action that could have been taken by counsel to make a difference in the outcome of the hearing, we have no basis for concluding an attorney would have been “helpful” in the sense intended by *Payne* and *Yarborough*.

B. Date of Defendant’s Ability to Pay

Defendant contends the trial court erred in considering her financial position during the second six-month period after sentencing, rather than restricting its consideration to the six months immediately following sentencing.

As we explained in *Polk*, “Under subdivisions (b) and (c) of [Penal Code section 987.8], an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has ‘the present ability . . . to pay all or a portion’ of the defense costs. [Citations.] If this finding is made, ‘the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.’ [Citation.] [¶] ‘Ability to pay’ means ‘the overall capability’ of the

² “If [the prisoner] is indigent and the court decides that a continuance is not feasible, it should then ascertain whether the prisoner’s interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case. The latter determination should be comparatively simple: if the prisoner is not contesting the suit against him, or any aspect of it, there is no need for counsel; but if he plans to defend the action and an adverse judgment would affect his present or future property rights, an attorney should be appointed.” (*Payne, supra*, 17 Cal.3d at p. 924.) This expansive language was considerably restrained by *Yarborough, supra*, 39 Cal.3d at pages 205–206.

defendant to reimburse all or a portion of the defense costs. [Citation.] It requires consideration of the defendant's financial position at the time of the hearing, his or her 'reasonably discernible' financial position over the subsequent six months, including the likelihood of employment during that time, and '[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county.' [Citations.] In calculating ability to pay, 'the court [must] consider what resources the defendant has available and which of those resources can support the required payment,' including both the defendant's likely income and his or her assets." (*Polk, supra*, 190 Cal.App.4th at pp. 1205–1206, fns. omitted.)

Defendant's argument is premised on footnote 24 of *Polk*, which reads, "The statute anticipates that a defendant's financial position will be determined at the time of sentencing. [Citation.] It is not clear whether a defendant's future earning potential may be included when, as here, the [Penal Code] section 987.8 motion is filed six months after sentencing. Defendant has not challenged the timing of the motion." (*Polk, supra*, 190 Cal.App.4th at p. 1205, fn. 24.) According to defendant, "Th[is] Court did not address this question because [defendant's] attorney had not raised it. [Citation.] But [defendant] did raise it in the hearing below and raises it now."³

For two reasons, we find no reversible error. First, it is by no means clear the trial court made any error with respect to the manner in which it determined defendant's ability to pay. The trial court found, "I am satisfied that, in fact, at the time of sentencing and at the time of the hearing that I held [six months after sentencing], the defendant had a present financial position that was sufficient to pay for the costs of her representation" As to her future earning potential, the court found that during the 12 months following sentencing "there was no likelihood that she would have earned income." Accordingly, the trial court's finding on ability to pay appears to have been based on

³ To the extent defendant now contends the trial court erred in 2007, as her brief suggests, any such claim of error was waived when it was not raised in the first appeal. (*Medraza v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 15.) Further, any such error was mooted by the trial court's more recent hearing.

defendant's financial position at the time of sentencing and during the following six months, as required by statute. It could not have rested on her earning potential past that time, since the court expressly found there was no such potential.

Second, any error was not prejudicial. In articulating its reasoning, the trial court did mention defendant's financial position during the six months following its hearing. Assuming this was error,⁴ any consideration of defendant's financial position more than six months after sentencing was necessarily harmless because her financial position remained the same from the time of sentencing through the subsequent year. Throughout the entire period, defendant possessed a valuable asset and, as a result of her incarceration, had no income and essentially no living expenses.

Defendant contends her financial position and ability to pay changed at the time her house was sold. There is no doubt the sale converted an illiquid asset, her half-interest in the home, into cash. "Ability to pay," however, is not based on a defendant's *cash* position but on the "overall capability of the defendant to reimburse the costs," including "[t]he defendant's present financial position." (Pen. Code, § 987.8, subd. (g)(2)(A).) A defendant's "present financial position" includes any equity interest in real estate. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1218 [court could consider value of defendant's home in excess of the mortgage].) The sale of defendant's half-interest in the house merely changed the form of her assets. It did not change her financial position for purposes of section 987.8.

III. DISPOSITION

The order of the trial court is affirmed.

⁴ Given our holding, we need not decide whether, in fact, the trial court would have erred in considering defendant's earning capacity or financial position in the six months after the initial hearing.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.